TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 932.

ROGER M. SHERMAN, PLAINTIFF IN ERROR,

vs.

IRVING GRINNELL AND GEORGE S. BOWDOIN, EXECUTORS OF MOSES H. GRINNELL, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 22, 1887.

SUPREME COURT OF THE UNITED STATES.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 21, 1887.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the Southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea and an order remanding a cause, dated February 26, 1886, which is in the said circuit court, before you or some of you, between Roger M. Sherman, plaintiff in error, defendant, and Irving Grinnell and George S. Bowdoin, as executors, defendants in error, plaintiffs, a manifest error hath happened, to the great damage of the said Roger M. Sherman, as is said and as appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 22d day of April, 1887, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and customs of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this eighth day of April, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and eleventh.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Allowed April 8th, 1887.

SAM'L BLATCHFORD, *A. J. S. C.*

2 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to thirty-one, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Roger M. Sherman, plaintiff in error, against Irving Grinnell and George S. Bowdoin, as executors, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this fifteenth day of April, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and eleventh.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

[Endorsed:] Writ of error. U. S. circuit court. Filed Ap'l 8, 1887. Timothy Griffith, clerk.

3 City Court of New York.

IRVING GRINNELL *et al v.* ROGER M. SHERMAN.

CLERK'S OFFICE, CITY COURT OF NEW YORK.

I, John Reid, clerk of the city court of New York, having compared the annexed order, petition, and bond in the above-entitled action with the original on file in this office, do certify that the same are correct transcripts therefrom and of the whole of said originals.

In witness whereof I have hereunto subscribed my name and affixed the seal of the city court of New York this 26th day of Feb., A. D. 1886.

[L. S.] JOHN REID, *Clerk.*

4 At a special term, in chambers, of the city court of New York, held in the city hall on the 30th day of October, 1885.

Present: Hon. Chas. J. Nehobas, justice.

IRVING GRINNELL & ANO. *v.* ROGER M. SHERMAN.

On reading and filing the petition of Roger M. Sherman and the bond therewith, and on motion of said Roger M. Sherman—

Ordered, That said petition and bond be, and they are hereby, received and approved, and that this court proceed no further herein.

A copy.

[L. S.] (Signed) JOHN REID, *Clerk.*

4½ Endorsed: City court of New York. Irving Grinnell *et al. vs.* Roger M. Sherman. Copy. Order.

Messrs. Evarts, Choate & Beaman.

GENTLEMEN: Within is a copy of an order entered in this action this 30th day of October, 1885, on file herein, of which please take notice.

Re'p'y, ROGER M. SHERMAN,
204 *Broadway, N. Y. City.*

5 City Court of New York.

IRVING GRINNELL and GEORGE S. BOWDOIN, Executors, &c., Plaintiffs,

vs.

ROGER M. SHERMAN, Defendant.

To the city court of New York:

The petition of Roger M. Sherman, the defendant in the above-entitled action, respectfully shows—

That a suit or action was commenced by the service of a summons and complaint, on the 28th day of October, 1885, in this court by Irving Grinnell and George S. Bowdoin, as executors, &c., of Moses H. Grinnell, deceased, against your petitioner to recover, as appears by the complaint in said suit or action, the sum of $1,778.95,
6 alleged to have been awarded them as such executors as a moiety of certain penalties under the customs revenue laws of the United States, including the act of March 2, 1867, and alleged to be wrongfully withheld by your petitioner as their attorney, &c.

That your petitioner desires to remove said suit to the circuit court of the United States for this district.

That the matter in dispute exceeds the sum of five hundred dollars exclusive of costs.

That said suit is of a civil nature and is one arising under the laws of the United States, namely, the revenue laws aforesaid, and the question involved therein is whether the sum alleged to have been collected is the property of the United States or the plaintiff, and whether the acts aforesaid, which constitute the entire right of the plaintiffs thereto, have been repealed by the act of Congress of June 22, 1874, and whether said sum has been paid from the Treasury
7 of the United States in conformity with the laws of the United States, and whether the demand of the United States upon the defendant for repayment into the Treasury of the United States of said sums as having been paid by mistake and without authority of law is by the laws of the United States a complete defence to the claims of the plaintiffs, and other questions are involved therein depending upon the laws of the United States and decisive of said suit.

And your petitioner intends duly to enter his appearance in such suit or action in this court simultaneously with the filing of this his petition, and herewith offers and files a bond, with good and sufficient surety, for his entering in the circuit court of the United States for the southern district of New York, on the first day of the next session, a copy of the record in such suit and for paying all costs that may be awarded by the said circuit court if said court
8 shall hold that such suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit if special bail was originally requisite therein.

Wherefore your petitioner prays that the said suit or action may be removed for trial into the said circuit court next to be held after the filing of his petition, and that this court accept this petition and the bond herewith offered and proceed no further in the said suit or action.

Dated October, 1885.

ROGER M. SHERMAN.

COUNTY OF NEW YORK, ss:

Roger M. Sherman, being duly sworn, deposes and says that he is the defendant in this action; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

9 ROGER M. SHERMAN.

Sworn to before me this 30th day of October, 1885.

JAMES J. McCLOSKEY,
Notary Public, N. Y. Co.

10 Know all men by these presents that we, Roger M. Sherman, as principal, and Richard G. Berford, of 311 West 50th street, New York, and Benaiah G. Jayne, of 29 West 42d street, New York, as sureties, are held and firmly bound unto Irving Grinnell and George S. Bowdoin, as executors of the last will and testament of Moses H. Grinnell, deceased, in the sum of two hundred and fifty dollars, lawful money of the United States, to be paid to the said Irving Grinnell and George S. Bowdoin as such executors, their executors, administrators or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of October, 1885.

Whereas a suit or action has been commenced in the city court of New York by the above-named Irving Grinnell and George S. Bowdoin, as executors as aforesaid, against Roger M. Sherman,

11 and the amount in dispute in said suit or action, exclusive of costs, exceeds the sum or value of five hundred dollars; and

Whereas said suit arises under the laws of the United States; and

Whereas said Roger M. Sherman is about to file his petition pursuant to the statute in such case provided for the removal of the said suit or action for trial into the circuit court of the United States for the Southern District of New York next to be held after the filing of the said petition:

Now, therefore, the condition of the above obligation is such that if the said Roger M. Sherman shall enter in said circuit court, on the first day of its then next session, a copy of the record in said suit or action, and shall pay all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall also there appear,

then the above obligation to be void; otherwise to remain in
12 full force and virtue.

ROGER M. SHERMAN. [L. S.]
R. G. BERFORD. [L. S.]
B. G. JAYNE. [L. S.]

COUNTY OF NEW YORK, ss:

On this 30th day of October, 1885, before me personally appeared Roger M. Sherman and Richard G. Berford, to me known and known to be the same persons named in and who executed the foregoing bond, who acknowledged then and there that *he* executed the same.

GEO. C. COFFIN,
Notary Public, N. Y. Co.

COUNTY OF NEW YORK, ss:

On this 30th day of October, 1885, before me personally appeared Benaiah G. Jayne, to me known and known to be the same person named in and who executed the foregoing bond, who acknowledged then and there that he executed the same.
13 LEO G. ROSENBLATT,
Notary Public, N. Y. Co.

COUNTY OF NEW YORK, ss:

Richard G. Berford, being duly sworn, says that he is a resident and householder within the State of New York; that he is worth the sum of five hundred dollars over and above all his debts and liabilities and property exempt by him from execution.

R. G. BERFORD.

Sworn before me this 30th day of October, 1885.

GEO. C. COFFIN,
Notary Public, N. Y. Co.

COUNTY OF NEW YORK, ss:

Benaiah G. Jayne, being duly sworn, says that he is a resident and householder within the State of New York; that he is worth the sum of five hundred dollars over and above all his lia-
14 bilities and property exempt by him from execution.

B. G. JAYNE.

Sworn before me this 30th day of October, 1885.

[L. S.] DANIEL E. DELAVAN,
Notary Public (139), *N. Y. Co.*

Approved October 30, 1885.

CHARLES J. NEHRBAS, *Justice.*

(Endorsed:) City court of New York. Irving Grinnell and ano. against Roger M. Sherman. Copy record. U. S. circuit court. Feb. 26, 1886. Timothy Griffith, clerk.

15 United States Circuit Court, Southern District of New York.

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors, &c., Plaintiffs,

ag'st

ROGER M. SHERMAN, Defendant.

SIR: Please take notice that on the affidavit of Treadwell Cleveland, hereto annexed, a copy whereof is herewith served upon you, and upon all the papers and proceedings heretofore had herein a motion will be made on behalf of the plaintiffs, by their attorneys, at a stated term of this court, to be held at the rooms of said court, in the United States court-house in the city of New York, on the nineteenth day of February, 1886, at the opening of the court on that day or as soon thereafter as counsel can be heard, for an order directing that said court proceed no further in this suit, but that it be remanded to the city court of New York, and for such other and further order or relief as the court may deem equitable in the premises.

Yours, &c., EVARTS, CHOATE & BEAMAN.

Dated New York, Feb'y 15, 1886.

To Roger M. Sherman, Esq.

16 SOUTHERN DISTRICT OF NEW YORK, *ss:*

United States Circuit Court, Southern District of New York.

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors, &c., Plaintiffs,

against

ROGER M. SHERMAN, Defendant.

I, Treadwell Cleveland, being duly sworn, depose and say as follows:

I am one of the counsel for the plaintiffs herein. This suit was begun in the city court of New York on the 28th day of October, 1885, by the service on that day of the summons and complaint herein. On or about the 30th day of October, 1885, this suit was, *as* the petition of the defendant and by an order to that effect made by one of the justices of said city court, removed to this court.

This suit is brought to recover the sum of seventeen hundred and seventy-eight dollars and ninety-five cents awarded to the plaintiffs, as executors of the last will and testament of Moses H. Grinnell, deceased, which sum of money was, on or about the 9th day of May, 1885, paid to the defendant as the attorney-in-fact of the plaintiffs, and the defendant received the said sum of money as the attorney-in-fact of the plaintiffs and in no other capacity whatsoever.

17 The defendant, though thereunto duly requested, has refused and still refuses to pay the said sum of money so received to the plaintiffs, and has not paid the same nor any part thereof to them.

The defendant, in his petition for the removal of this suit to this court, alleges that this suit is one arising under the laws of the United States, namely, the revenue laws aforesaid, and that the question involved therein is whether the sum alleged to have been collected is the property of the United States or of the plaintiffs, and whether the acts of Congress, including the act of March 2nd, 1867, which constitute the entire right of the plaintiffs thereto, have been repealed by the act of Congress of June 22nd, 1874, and whether said sum has been paid from the Treasury of the United States in conformity with the laws of the United States, and whether the demand of the United States upon the defendant for repayment into the Treasury of the United States of said sum as having been paid by mistake and without authority of law is by the laws of the United States a complete defence to the claims of the plaintiff, and that other questions are involved therein depending upon the laws of the United States and decisive of this suit.

I verily believe that this suit is not one arising under the Constitution or laws of the United States, and that it does not really or substantially involve a dispute or controversy properly within the jurisdiction of this court and has been improperly removed thereto.

TREADWELL CLEVELAND.

Sworn to before me this 18th day of January, 1886.

[L. S.] WM. R. MONTGOMERY,
Notary Public, New York County.

(Endorsed:) U. S. circuit court, southern district of New York. Irving Grinnell and another against Roger M. Sherman. Affidavit and notice of motion. Evarts, Choate & Beaman, plaintiff's attorneys, 52 Wall street, N. Y. city. Filed in open court Feb'y 26, 1886.

18 At a stated term of the circuit court of the United States for the southern district of New York, held at the rooms of the said court, in the United States court-house, in the city of New York, on the 26th day of February, 1886.

Present: Hon. William J. Wallace, judge.

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors of the Last Will and Testament of Moses H. Grinnell, Deceased, Plaintiffs,

against

ROGER M. SHERMAN, Defendant.

A motion having heretofore been made in behalf of the plaintiffs in the above-entitled action for an order remanding said action to the court from whence said action was removed, namely, the city court of New York, and the said motion now coming on to be heard,

after hearing Allen W. Evarts, Esq., of counsel for the plain-
19 tiffs, in support of said motion, and Roger M. Sherman, Esq., the defendant, in person, in opposition thereto—

Now, upon reading and filing the record herein and the affidavit of Treadwell Cleveland, verified herein the eighteenth day of January, 1886, and on motion of Messrs. Evarts, Choate & Beaman, attorneys for the plaintiffs herein, it is hereby

Ordered that said motion be, and the same hereby is, granted, with twenty dollars' costs to the plaintiffs as against the defendant; and it is further

Ordered that this action be, and the same hereby is, remanded to the city court of New York.

(Signed) WM. J. WALLACE.

Endorsed: United States circuit court, southern district of New York. Irving Grinnell, &c., *vs.* Roger M. Sherman. Order.
20 Evarts, Choate & Beaman, pl'ffs' att'ys, 54 Wall St., New York city. U. S. circuit court. Filed May 4, 1886. Timothy Griffith, clerk.

21 Supreme Court of the United States, of December Term, 1886.

ROGER M. SHERMAN, Plaintiff in Error,

vs.

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors, Defendants in Error.

Afterwards, to wit, on the first Monday in December in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Roger M. Sherman *in propria persona* and says that in the records and proproceedings aforesaid there is manifest error, in this, to wit:

Whereas it appears from the complaint aforesaid that the plaintiffs sue to recover a share of penalties or moieties alleged to have been awarded to a collector of customs by the Secretary of the Treasuary, and that said penalties were incurred for breaches of
22 the customs revenue laws prior to July 20, 1870, and recovered by the United States upon a proof of the debt in bankruptcy May 9, 1885;

And whereas by the act of June 22, 1884, it appears that all laws conferring such authority were repealed, and any such award was prohibited and the determination of the claim asserted involves the question whether such award is contrary to law and confers any title upon the plaintiffs, and whether the allegations of the complaint do not show that the subject of the action is money of the United States improperly paid from the Treasury by mistake and contrary to law, in which the plaintiffs have no right, title, or interest;

And whereas it appears in like manner that the plaintiffs rely upon a legal title to moneys which could be lawfully paid to them or their agent only pursuant to a statute of the United States, and allege a conversion of the identical money aforesaid, and that said

money is alleged to have come into the defendants' possession by force of a power of attorney prohibited and void by section
23 3477 of the Revised Statutes of the United States, whence no right, title, or interest could accrue to the plaintiffs;

And whereas it appears from the petition for removal aforesaid that said said suit involves the question whether the sum alleged to have been collected is the property of the United States or of the plaintiffs, and whether the acts of Congress aforesaid, which constitute the entire legal right of the plaintiffs to said money, have been repealed by the act of June 22, 1874; and whether said sum has been paid from the Treasury of the United States in conformity with the laws of the United States, and whether the demand of the United States upon the defendant for repayment into the Treasury of the United States of said sum as having been paid by mistake and without authority of law is by the laws of the United States a complete defence to the claims of the plaintiffs;

And whereas for each and all of said reasons the suit is one arising under the laws of the United States and was properly removed to the circuit court of the United States for the southern dis-
24 trict of New York from the city court of New York, said circuit court erred in remanding said cause to said city court of New York by its said order of February 26, 1886, and in each and every part of said order and in its subsequent proceedings thereupon.

And the said Roger M. Sherman prays that the judgment and order aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of the said judgment and order.

ROGER M. SHERMAN,
Plaintiff in Error.

25 [Endorsed:] Supreme Court. Roger M. Sherman, plaintiff in error, against Irving Grinnell *et al.*, defendant in error. Assignment of errors. Roger M. Sherman, pl'ff in error, 234 Broadway, New York. To —— ——, Esq., attorney for —— ——. Due service of — is hereby admitted. Dated New York, —— 18—. Attorney for —— ——. U. S. circuit court. Filed Ap'l 9, 1887. Timothy Griffith, clerk.

26 Supreme Court of the United States.

ROGER M. SHERMAN, Plaintiff in Error.

v.

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors, Defendants in Error.

And now comes the said plaintiff in error and says that in the record and proceedings aforesaid there is further manifest error, in this, to wit:

That whereas it appears therein that the record aforesaid, prior to removal, contained a summons and complaint, the said circuit court,

without the presentation or filing of a complete copy of the record, including said summons and complaint, and without any copy thereof or lawful substitute therefor, and before the time when by law this plaintiff in error was in anywise bound to present or
27 file the same, and without requiring the plaintiffs to declare *de novo*, proceeded, against his objection, to adjudge that the said suit did not really and substantially involve a dispute or constitute a suit arising under the laws of the United States, and that said circuit court erred in making such decision without the presence of the pleading or complaint of the plaintiffs in said suit.

And the said Roger M. Sherman prays as aforesaid, &c.

ROGER M. SHERMAN,
Plaintiff in Error.

[Endorsed:] Supreme Court of the U. S. Roger M. Sherman, pl'ff in error, *v.* Irving Grinnell & *al.*, def'ts in error. Copy further assignment of error. U. S. circuit co't. Filed Ap'l 15, 1887. Timothy Griffith, clerk. Roger M. Sherman, pl'ff in error, 56 Wall St., New York.

28 *Bond for Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors, Plaintiffs, Defendants in Error,

vs.

ROGER M. SHERMAN, Defendant, Plaintiff in Error.

Know all men by these presents that we, Richard G. Berford and Walter R. Sherman, are held and firmly bound unto the above-named Grinnell and Bowdoin, as executors, in the sum of two hundred and fifty dollars, to be paid to the said Grinnell and Bowdoin, as executors; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 31st day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas the above-named Roger M. Sherman has prosecuted a writ of error to the Supreme Court of the United States to reverse the order of remand and judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Roger M. Sherman shall prosecute his writ of error to effect and answer all costs if he shall fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

R. G. BERFORD. [L. S.]
W. R. SHERMAN. [L. S.]

COUNTY OF NEW YORK, ss:

Sealed and delivered and taken and acknowledged this 31st day of March, 1887, before me, as to Richard G. Berford.

CHAS. C. MARBLE,
Notary Public, N. Y. Co.

As to Walter R. Sherman.

CHAS. C. MARBLE,
Notary Public, N. Y. Co.

29 UNITED STATES OF AMERICA,
Southern District of New York, County of New York, } ss:

Richard G. Berford, being duly sworn, deposes and says that he is a resident and householder in the city of New York; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

R. G. BERFORD.

Sworn to this 31st day of March, A. D. 1887, before me.

CHAS. C. MARBLE,
Notary Public, N. Y. Co.

COUNTY OF NEW YORK, ss:

Walter R. Sherman, being duly sworn, deposes and says that he is a resident and householder in the city of New York; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

W. R. SHERMAN.

Sworn to this 31st day of March, 1887, before me.

CHAS. C. MARBLE,
Notary Public, N. Y. Co.

The within bond is approved.
April, 8th, 1887.

SAM'L BLATCHFORD, *A. J. S. C.*

[Endorsed:] Vol. —, page —. U. S. circuit court. Irving Grinnell & *al. vs.* Roger M. Sherman. Bond for costs on writ of error. Roger M. Sherman, att'y for pl'ff in error, in person, 56 Wall St., New York. U. S. circuit court. Filed Apr. 8, 1887. Timothy Griffith, clerk.

30 UNITED STATES OF AMERICA, ss:

To Irving Grinnell and George S. Bowdoin, as executors, &c., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the 22d day of April, 1887, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for

the southern district of New York, wherein Roger M. Sherman is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment and order in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, April 8th, 1887.

SAM'L BLATCHFORD, *A. J. S. C.*

31 [Endorsed:] Supreme Court of the United States. Roger M. Sherman, pl'ff in error, *v.* Irving Grinnell *et al.*, def's in error. Citation. Service of a copy of within citation April 9, 1887, admitted. A copy of the within paper received this day at this office, Apr. 9, 1887. Evarts, Choate & Beaman, att'ys for pl'ff, 52 Wall St., New York. U. S. Ct. Ct. Fi. Apr. 9, 1887. Timothy Griffith, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 932. Roger M. Sherman, plaintiff in error, *vs.* Irving Grinnell & George S. Bowdoin executor of Moses H. Grinnell, dec'd. Filed April 22, 1887.

3-649

SUPREME COURT OF THE UNITED STATES.

ROGER M. SHERMAN,
Plaintiff in Error,

AGAINST

IRVING GRINNELL and GEORGE S. BOWDOIN,
Defendants in Error.

Oct. Term, 1886.
No. ~~4930.~~ 932

MOTION BY PLAINTIFF IN ERROR TO ADVANCE UNDER RULE 32.

Statement.

On February 28, 1886, the U. S. Circuit Court for the Southern District of New York made an order remanding the cause below to the State Court, whence it had been removed by the defendant, the plaintiff in error. The writ of error was sued out under Sec. 5, Act March 3, 1875, on April 9, 1887, to review that order. The record and return were filed April 22, 1887, and the cause duly docketed. Both parties have duly appeared.

The plaintiff in error moves, under the 32d rule to advance, in order that he may bring on the cause by submission ~~at the opening of~~ early in the October Term, which he prays leave to do.

~~May 16,~~ 1887.

ROGER M. SHERMAN,
Plaintiff in Error.

123-679
123-679

Burgoyne Quick Printing Co., cor. Centre and Walker, N. Y.

Office Supreme Court U. S.
FILED.
NOV 8 1887
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

ROGER M. SHERMAN,
Plaintiff in Error,

AGAINST

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors,
Defendants in Error.

Oct. Term, 1887.
No. 932.
Advanced Oct. 17, under 32d Rule.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This is a writ of error allowed under section 5, Act of March 3, 1875, April 9, 1887, to review an order of U. S. Circuit Court, Southern District of New York, remanding an action at law, removed October 30, 1885, from the City Court of New York. The motion to remand was made February 26, 1886, before the next session of the Circuit Court after removal, which was the first Monday in April, 1886 (U. S. Rev. St., § 658). The removal was made after service of the complaint, but before answer. The petition was based expressly upon the complaint, asserting that the case arose under the laws of the United States. The plaintiffs, contrary to the requirements of the New York Code (§ 824), did not file their complaint. Although they moved "upon all the papers and proceedings theretofore had," the record

which they presented to the Circuit Court did not contain the complaint, and they presented no substitute for it except an affidavit of Mr. Cleveland embodying his belief of its legal effect. The sole point raised by the plaintiffs below was that the money was received by defendant as their attorney in fact, and that he was therefore estopped from going into the federal questions (Cleveland's Affidavit, p. 6).

The Court below held that the complaint did not state a cause of action arising under the laws of the United States, without having the complaint before it.

The petition, taken alone, sufficiently shows that the suit is brought to recover a sum alleged to have been awarded plaintiffs as a moiety of penalties under the customs revenue laws of the United States, including the Act of March 2, 1867, and held by defendant as their attorney. Mr. Cleveland's affidavit alleges that the money was paid defendant May 9, 1885. The removal being before answer, all the facts cannot now be laid before this Court, but enough appears to show at this stage that a federal question is involved, by reason, among others, of the act repealing the act of 1867 and moieties, passed June 22, 1874.

Assignments of Error.

Whereas it appears from the petition for removal that the suit involves the question whether the sum alleged to have been collected is the property of the United States or of the plaintiffs; and whether the acts of Congress, which constitute the entire legal right of the plaintiffs to said money, have been repealed by the Act of June 22, 1874, and whether said sum has been paid from the Treasury of the United States in conformity with the laws of the United States, and whether the demand of the United States upon the defendant for repayment into the Treasury of the United

States of said sum as having been paid by mistake and without authority of law is by the laws of the United States a complete defense to the claims of the plaintiffs (Record, p. 9).

And whereas, it appears therein that the record prior to removal contained a summons and complaint, the Circuit Court, without the presentation or filing of a complete copy of the record including said summons and complaint, and without any copy thereof or lawful substitute therefor, and before the time when by law this plaintiff in error was in anywise bound to present or file the same, and without requiring the plaintiffs to declare *de novo*, proceeded against his objection to adjudge that the said suit did not really and substantially involve a dispute or constitute a suit arising under the laws of the United States, and that said Circuit Court erred in making such decision without the presence of the pleading or complaiut of the plaintiffs in said suit (pp. 9, 10).

The other assignments are inoperative because of the absence of the complaint.

POINTS.

I.

It could not judicially appear to the satisfaction of the Court upon the record in the absence of the complaint before the next term of the Circuit Court and before any obligation rested on the defendant to present the record, that the suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of that Court.

U. S. Rev. St. § 645.
Act March 3, 1875, Secs. 5, 6, 18 St., 472.
Bradstreet vs. Thomas, 12 Pet., 177.

The complaint was part of the record within the meaning of the act; the petition need not present it.

Gold W. & M. Co. vs. Keyes, 96 U. S., 202. 4

The withholding of the complaint cannot inure to the advantage of the plaintiffs below.

Act of 1875, § 7.
Dennistown vs. Draper, 5 Bl., 336.
Fisk vs. Union P. R., 6 Bl., 381.
Fisk vs. Union P. R., 8 Bl., 246.
McBratney vs. Usher, 1 Dill., 367.

Even if proceedings for remand can be had before the next term after removal the defendant comes *in invitum* to oppose. The plaintiffs by the notice of motion, assumed the duty of producing "all papers and proceedings theretofore had" (Record, p. 6). The defendant was therefore not in fault respecting the absence of the complaint. The Circuit Court must proceed as if the suit had been originally commenced there.

Act March 3, 1875, Sec. 6.

In that view the determination, in the absence of the complaint, would have been error for which this Court would reverse.

U. S. vs. Kirkpatrick, 9 Wh., 729.
Garland vs. Davis, 4 How., 131.
Mandeville vs. Burt, 8 Pet., 256.

II.

An essential ingredient in the cause of action is the legal title of the plaintiffs. Public moneys cannot come to hand so as to be subject to a mere equitable title to the use of the principal.

2 Story Eq. Jur., §§ 1042, 1045.
U. S. Rev. St., § 3477.

That title depends upon these statutes.

Under the Act of March 2, 1867, 14 U. S. St., 546, Moses H. Grinnell had an inchoate claim to moieties. But by the Act of June 22, 1874, 18 U. S. St., 186, the Act of 1867 and all acts by which he had any such claim were repealed (Secs. 2, 26); all the proceeds of fines, penalties and forfeitures were required to be paid into the treasury (Sec. 2); and existing rights of the United States *only* were saved (Sec. 26). By this act (Sec. 23) a collector's salary was increased to compensate for his loss of moieties. The United States thus exercised the sovereign right to modify or withdraw their gift, a right which they had in cases of seizure until condemnation (Mr. Justice STORY, "The brig Hollen," 1 Mason, 434), and had, in other cases, until the money was paid away *according to legislative will* (Mr. Justice JOHNSON, U. S. vs. Morris, 10 Wheat., 304).

There was but a single exception to this utter repeal of moieties. The Secretary of the Treasury had power (Sec. 26) to make allowance to Government officers in cases commenced before the passage of the act, for *forfeitures*, as provided in the 4th section of the act.

Thus the act recognized the distinction between seizures and proceedings *in rem* and other fines and penalties *in personam*, affirmed by Judge STORY (1 Mason, 434).

The 4th section denominates as "compensation" an award to Government officers, which the Secretary of the Treasury is authorized to make *in cases of goods seized for smuggling.*

This act (Sec. 3) makes an appropriation to carry out awards made to Government officers for *seizures* under the provisions of the 4th section "and not otherwise." It is the only "appropriation made by law" in the premises.

It is presumable that such an award could occur only upon some mistake of fact.

Daniels vs. Tearney, 102 U. S., at p. 421.

His mistake can confer no title upon plaintiffs. The money has been paid from the treasury contrary to law, the plaintiffs could have no title to it, and that fact appearing upon the face of the complaint it was an incurable taint in the cause of action as alleged:

U. S. Constitution, Sec. 9.
Reeside vs. Walker, 11 How., 291.
Whiteside vs. U. S., 93 U. S., 247.
Knote vs. U. S., 95 U. S., 154.
Steele vs. U. S., 113 U. S., 134.

It could not be waived or contracted away.

Coppell vs. Hall, 7 Wall, 558.
U. S. vs. Grossmayer, 9 *Ib.*, 75.

If instead of an innocent mistake, as assumed above, it were a fraud which plaintiffs clothed defendant with authority to commit, on which the defendant acted, yet no estoppel could operate in favor of plaintiffs.

Holman vs. Johnson, Cowp., 343.
Nellis vs. Clark, 20 Wend., 24.
Armstrong vs. Toler, 11 Wheat., 258.
Coppell vs. Hall, *supra.*
Colvin vs. Holbrook, 2 N. Y., 129.
Cox vs. Prentice, 3 Maule & S., 345.
Buller vs. Harrison, Cowp., 566.
Smith Merc. Law (8th Eng. Ed.), 162, 163.

To hold that such cause of action does not involve a federal question is to hold with the contention of Mr. Cleveland's affidavit which prevailed below that the *defendant can be estopped as an agent* from setting it up, while the law on the contrary is that the assertion of the cause of action destroys all obligations of agency, that the Court will take notice of the taint, of its own motion, that the defendant is a trustee for the United States and the suit aimed against their property.

Coppell v. Hall, *supra.*
Smith Merc. Law (8th Eng. Ed.), 162, 163.
The "Siren," 7 Wall., 154.
Carr vs. U. S., 98 U. S., 438.
U. S. vs. Peters, 5 Cr., 115.

It borders on absurdity for a Federal Court to say that a cause of action which involves the sovereignty of the Federal Government, the title to public money, the immunity of public money from the suit of a citizen, does not arise under the laws of the United States, that it can prevail by estoppel and thereupon to remand such a suit to be enforced by a State Court stripped of any federal question.

No agent can be compelled to render himself an instrument of fraud and when the award became known to the defendant by the description stated in the complaint, his plain and simple duty was to hold it subject to the claim of the United States and to decline to pay it to the plaintiffs.

His course in that respect may not be in accordance with the modern notions of some eminent and zealous attorneys, who serve their client at the expense of all other obligations.

But he respectfully submits that it should have the countenance of this Court.

III.

The order of February 26, 1886, should be reversed.

ROGER M. SHERMAN,
Plaintiff in Error *in propria persona.*

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Office Supreme Court U. S.
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JAMES H. MCKENNEY
CLERK

Supreme Court of the United States.

ROGER M. SHERMAN,
Plaintiff in Error,

AGAINST

IRVING GRINNELL AND GEORGE S. BOWDOIN, as Executors of Moses H. Grinnell, deceased,
Defendants in Error.

October Term, 1887. Advanced October 17, under 32d Rule.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of Facts.

This action was begun in the City Court of New York on October 28, 1885, by the service of a summons and complaint, to recover the sum of $1,778.95, which the defendant therein (now the plaintiff in error), collected while acting as the attorney in fact for the plaintiffs therein (now the defendants in error), executors of the last will and testament of Moses H. Grinnell, deceased. On October 30, 1885, on the petition of Sherman, who is an attorney at law and counsellor of this court, the cause was removed to the United States Circuit Court. On February 26, 1886, an order was made by said Circuit Court, on motion, remanding the cause to the City Court for trial,

This motion was based and this order was made "upon all the papers and proceedings theretofore had therein," and these embraced the complaint. Sherman, delaying the filing in the Circuit Court of a copy of the record from the City Court, seeks to have it appear that the Circuit Court when it made the order remanding the cause did not have the complaint in the action before it. The contrary is, of course, the fact.

We regret that the record made by Sherman in his vain defense of this suit, and in his appeals to the higher State Courts of the State of New York is not before this Court. It appears, however, that Sherman collected the money in question on May 9, 1885, and has since, notwithstanding all demands and suits, refused to pay it over to his principals and clients, the executors of Mr. Grinnell, alleging that the money is the money of the United States. He nowhere pretends that the United States has ever made any demand on, or brought any suit against, him for this money, or pretends that he has paid it, or any part of it to the United States. Nor does he offer to pay the money into Court, nor propose to interplead the United States. His sole defense is that the money is the money of the United States collected by him under a void power of attorney from the executors, and paid to him by the officers of the United States under a mistake of law.

First Point.

THIS SUIT IS NOT ONE ARISING UNDER THE LAWS OF THE UNITED STATES, AND THE QUESTIONS INVOLVED THEREIN ARE NOT OF FEDERAL JURISDICTION.

The controversy herein is not between the United States and the defendants in error, or between the United States and the plaintiff in error. It is wholly a controversy between client and attorney. Have these executors the right to receive from their attorney in fact and at law what he has collected for them, or has such attorney the right to retain such money, is the simple question involved.

The title to this money is not in issue except as between the principal and agent. Were the United States to sue for the recovery of the money, they could only sue the disclosed principal; they could not sue the agent. The question here is not whether the United States paid the money by mistake. That question cannot be settled in this suit. The United States is not a party to this suit. Such question can only be determined where the claim is asserted by some one having the right to make it. The plaintiff herein, is not, happily, an officer of the Government. When the money was paid to him, it was paid to him, not in his own right and as an attorney, but as the representative of his disclosed principals, his former and our present clients. When it was paid to him it was paid in law to them.

This is not the case of a claim by a third party to the property; there is in fact no claim made by any one except Sherman's defrauded clients. The United States makes no claim or demand. Sherman *says* the United States made a mistake in the law when they complied with his demand for this money and paid it to him on behalf of his principals, and because of this alleged mistake of law he says: "His plain and simple duty is to hold the money subject to the claim of the United States, and decline to pay it to his client."

The most that can be said in support of the contention that a law of the United States is involved in this action is that such law might possibly be incidentally involved—it certainly is not directly involved. Were the United States to sue for the recovery of the money, they could not sue Sherman, who was the attorney for the executors, but would be obliged to sue the executors. If then there has been, as Sherman alleges, a mistake in the law by the United States Government, the claim by that Government for the recovery of the money would be in the form of a suit against the executors of Mr. Grinnell, and not against Sherman, and if there has been in fact a mistake in the law, the executors find themselves in this position, namely, liable to suit for the return of the money, and yet with the money not in their actual possession, by reason of the position taken by this attorney.

Second Point.

THE EXECUTORS, DEFENDANTS HEREIN, WERE NOT OBLIGED TO ALLOW THE MONEY TO REMAIN IN THE HANDS OF THEIR ATTORNEY, THE PLAINTIFF HEREIN, AWAITING THE ADJUDICATION OF A CLAIM THAT HAS NOT YET BEEN MADE.

The alleged claim in this case of the United States Government is wholly imaginary, save in the mind of the attorney who desires to retain the money he has collected for his clients.

Can it be that an attorney may successfully defy all demands of his principals to regain possession of their property on the assertion by him, as a volunteer, that third persons, not parties to the suit, and who cannot be bound by the judgment, have a claim thereto?

If the executors shall fail to recover their money from this plaintiff they will be entirely without remedy in the premises. They cannot claim the money from the United States Government nor test their right in an action against that Government to have the money paid to them, for the money has already, in the eyes of the law, been paid by the Government to them by being paid to their attorney.

The attorney says that he is a Trustee for the United States. Perhaps his sensitive legal conscience can be satisfied by the payment of the money, not his own, to his clients, against whom the claim, if it exists, must be made, and who must repay it, should such mistake be established, whether they succeed in collecting it from their own attorney or not.

The lesson should be taught the plaintiff herein by this Court, that he cannot violate with impunity his trust to defend and save the rights and property of his principal, by himself seizing upon and retaining such property for his own use.

Third Point.

THIS ORDER SHOULD BE AFFIRMED.

EVARTS, CHOATE & BEAMAN,
Attorneys for the Executors, Defendants.

TREADWELL CLEVELAND,
Of Counsel.